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NO.

in the
Supreme Court
of the
United States

OCTOBER TERM, 198__

GUILLERMO SEGRERA,

Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether there was sufficient evidence presented to the jury to allow them to find Petitioner guilty beyond a reasonable doubt on all three counts?

II.

Whether there was sufficient evidence, independent of co-conspirator statements, to show by a preponderance of evidence of eveidence the Petitioner's knowing joinder and participation in the conspiracy?

III.

Whether the Petitioner's motion for severance should have been granted when there were mutually exclusive defenses including confessions; and there was prejudicial overflow from testimony and predisposition evidence presented against other Defendants?

IV.

Whether the Petitioner's motion for mistrial should have been granted when the Government's attorney presented improper, prejudicial questions and comment to the jury?

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Petitioner, GUILLERMO SEGRERA, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered January 15, 1985, affirming his conviction in the United States District Court for the Middle District of Florida, Fort Meyers Division, on April 22, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported. The opinion of the District Court is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1985.

This Court has jurisdiction under 28 U.S.C.A. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Federal Rules of Criminal Procedure 29, 14, and 33. These are reprinted in Appendix A, C, and D.

This case also involves Federal Rule of Evidence 801(d)(2)(e). Reprinted in Appendix B.

This case also involves the Fifth Amendment of the U.S. Constitution as provides in relevant part:

> "No person shall . . . be deprived of life, liberty or property, without due process of the law."

It also involves the Sixth Amendment provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

STATEMENT OF THE CASE

On November 10, 1982, the Petitioner, a Columbian national, who does not speak English, was indicted with three others on three drug related counts, in violation of the 21 U.S.C. Sec. 846 and Sec. 841(a)(1), to wit:

> Count (1) conspiracy to passes with intent to distribute cocaine; Count (2) possession with intent to distribute cocaine; Count (3) distribution of cocaine.

Two of the defendants (Gallop and Futch) were involved with an undercover agent of the United States Government regarding a cocaine "deal". The third defendant (Carrillo) had the cocaine in his possession and control. The Petitioner was part of fabricated story wherein Gallops and Futch told the undercover agent that "people from down South", "South Americans" and "Columbians" that they knew had a direct cocaine connection. However, the agent saw Petitioner only on two occasions; once at Futch's farm and next at the airport, and had no drug related conversations with him. The agent drew conclusions about SEGRERA based on inferences and from the information from Gallops and Futch.

At trial, both the agent and Futch stated that GUILLERMO SEGRERA was not "around the Bronco or pick up truck while the transaction was taking place."

At no time did anyone see the Petitioner touch or have any direct or indirect control of the bags containing the cocaine. His fingerprints were not found on the bags.

The jury found the Petitioner and the three others guilty on March 11, 1983.

The Petitioner on appeal raised four issues:

(I) The District Court erred in denying Petitioner's motion for acquittal when there was insufficient evidence to show that he was a member of a conspiracy pursuant to Rule 29, F. R. Crim. P.

(II) The District Court erred in admitting hearsay statements of co-conspirators into evidence against the Petitioner when there was insufficient independent evidence to show that he was a member of the conspiracy. The District Court abused its discretion by not holding a hearing to determine the admissibility of the "co-conspirators statements" in advance of their presentation to the jury at trial. This violates the Confrontation clause of the Fifth Amendment and the preferred order of proof of the Eleventh Circuit, pursuant to F.R.E. 801(d)(2)(e), and *United States v. James*, 590 F.2d 575 (5th Cir. 1979).

(III) The District Court abused its discretion in denying the Petitioner's motions for severance pursuant to Rule 14, F.R. Crim. P. and/or mistrial, pursuant to F. R. Crim. P., based on the prejudicial effect of mutually exclusive defenses of the co-defendants; and the prejudicial overflow of the testimony against the co-defendants.

(IV) The District Court erred in denying Petitioner's motion for mistrial when there were improper and prejudicial prosecutorial comments and arguments, made during trial which unjustly affected the Petitioner's trial pursuant to Rule 33, F. R. Crim. P.

The Court of Appeals for the Eleventh Circuit affirmed the conviction without an opinion.

REASONS FOR GRANTING THE WRIT

The court's denial of Petitioner's motions deprived him of a fair trial as guaranteed by the United States Constitution pursuant to the Sixth Amendment. The District Court, as affirmed by the Court of Appeals for the Eleventh Circuit, failed to grant the Petitioner's remedial motions and thus deprived him of a completely fair trial guaranteed by the due process clause of the United States Constitution (Fifth Amendment). Due to the grievious errors which occurred during the Petitioner's trial and affirmed by the Court of Appeals, the Petitioner was deprived of a just and fair under the standards of the United States Constitution.

1. *Denial of Motion For a Judgment of Acquittal When There Was Insufficient Evidence to Support Petitioner's Conviction.*

The evidence was insufficient to support the Petitioner's conviction for conspiracy, possession and sale of cocaine. His mere presence and association with the confessed conspirators is not enough to convince a jury of his guilt beyond a reasonable doubt.

For a conspiracy conviction, there must be proof beyond a reasonable doubt that the conspiracy existed, that the accused knew of it, and that the accused, with that knowledge, voluntarily became a part of it. *United States v. Caro*, 569 F.2d 411, 415-416 (5th Circ. 1978); *United States v. Barrera*, 547 F.2d 1250 (5th Circ. 1977). The crucial issue for determination is whether the Government has carried its burden of proving beyond a reasonable doubt that Petitioner, SEGRERA, knowingly participated in a conspiracy.

It is helpful to consider the evidence presented by the Government in two categories: (1) the hearsay declarations of Petitioner's alleged co-conspirators, and (2) evidence independent of the hearsay. In weighting the sufficiency of the evidence, the Government's independent evidence must have been sufficient to establish Petitioner's participation in the conspiracy. *United States v. Oliva*, 497 F.2d 130 (5th Circ. 1974). Only if the Prosecution had demonstrated SEGRERA's participation in a conspiracy by a preponderance of independent evidence would the trial court have been justified in admitting the hearsay statements of the co-defendants for the Jury's consideration against the Petitioner. *United States v. Grassi*, 616 F.2d 1295 (5th Circ. 1980); *United States v. James*, 590 F.2d 575, 582-583 (5th Circ. 1979). Such a showing of Petitioner's participation did not take place here.

The evidence in the case clearly showed that throughout the course of the conspiracy, Joe Carrillo was the one who negotiated for the sale of cocaine with Gallops, Futch and the undercover agent. Moreover, Carrillo was shown to be the person who obtained, guarded, transported, and exchanged the cocaine. Apart

from hearsay, only inferences based on what Carrillo, Futch and Gallops did and said connect SEGRERA with the conspiracy.

Proximity to a crime or even actual presence at the scene of a crime is not sufficient to prove beyond a reasonable doubt Petitioner's agreement to, and knowing participation in the conspiracy. *United States v. Barrera*, 547 F.2d at 1257 (5th Cir. 1977).

On the facts before the Court, a reasonable juror could not have been able to reasonably exclude the hypothesis of the Appellant's innocence. Although SEGRERA was present at the airport, his mere presence was insufficient to sustain a conviction of conspiracy. There is no evidence that SEGRERA ever touched the green duffel bag containing the drugs, or that he was aware of its contents. The joint presence of the defendant and the conspirators at the airport and the pre-existing relationship between the parties is insufficient alone to prove beyond a reasonable doubt that Appellant had a part in the conspiracy. *United States v. Duckett*, 550 F.2d at 1030-1031 (5th Cir. 1978).

It is clear that the jurors should have entertained a reasonable doubt about SEGRERA's guilt. The Prosecution introduced no evidence in this case from which to determine the part SEGRERA was supposed to have played in the conspiracy. Where, as here, the facts are too weak to support the necessary inferences beyond a reasonable doubt, the conviction cannot stand. *United States v. Duckett, supra.*

Therefore, the court erred in denying Petitioner's motions for acquittal pursuant to Rule 29, F. R. Crim. P.

2. *The District Court Erred in Admitting Hearsay Statements Of Alleged Co-Conspirators Into Evidence Against Petitioner When There Was Insufficient Independent Evidence to Show That He Was A Member of the Conspiracy Thus Violating the Confrontation Clause of the Fifth Amendment.*

The only evidence which linked Petitioner, SEGRERA, with the conspiracy was presented in the testimony of the Government's chief witness, Agent Rogers, and the testimony of defendants, Futch and Gallops. This evidence placed SEGRERA at the farm with the other alleged conspirators on October 25, 1982, and in the proximity of the cocaine transaction at the Fort Meyers airport on November 4, 1982. There was no evidence that Petitioner, SEGRERA, knew cocaine was present or that he ever had possession or had control of any such cocaine. There was nothing specifically linking SEGRERA to a conspiracy involving cocaine apart from the statements of the co-conspirators. The necessity for a *James* hearing to determine the admissibility of alleged co-conspirator statements is graphically portrayed in this case. It was error for the Court to admit the hearsay statements against the Petitioner without first establishing an independent basis of proof, as requested by Mr. Segrera in his pre-trial motion. (T. 11-15) *United States v. Perry*, 624 F.2d at 31 (5th Cir. 1980); *United States v. Ziegler*, 583 F.2d 77 (2nd Circ. 1978).

Conspirational participation is clearly not evidenced by mere association with a conspiracy's members. Whatever misdeeds the evidence against Mr. Segrera may suggest, it fails to establish his participation in the conspiracy. Without independent support, the hearsay evidence is inadmissable against Petitioner, SEGRERA. *United States v. Diecidue*, 603 F.2d 535, 555 (5th Cir. 1979).

Therefore, the District Court erred in admitting hearsay statements of alleged co-conspirators into evidence againt SEGRERA pursuant to F.R.E. 801(d)(2)(e), without sufficient independent evidence of SEGRERA's membership in the conspiracy. The court's erroneous admission of hearsay against the Petitioner had an improper and prejudicial effect on the jury's verdict.

3. *Denial of Motion for Severance and/or Mistrial When There Was Mutually Exclusive Defenses and Prejudicial Spillover from Evidence Offered Against Co-Defendants.*

On a number of occasions during the trial, the Petitioner, SEGRERA, motioned the trial court for severance, pursuant to Rule 14, F. R. Crim. P., and/or a mistrial, pursuant to Rule 33, F. R. Crim. P. He based these motions on the antagonistic and mutually exclusive defenses of the Defendants, on the prejudicial overflow from testimony of Futch and Gallops, and on the prejudicial effect of predisposition evidence offered against Futch and Gallops. Petitioner SEGRERA pointed out to the Court the specific and compelling prejudice piling up against him. The trial court's failure to grant the Appellant's remedial motions deprived him of the completely fair trial guaranteed by the due process

clauses of the U.S. Constitution. *Barton v. United States*, 263 F.2d 894 (5th Circ. 1959); *Schaffer v. United States*, 221 F.2d 17 (5th Circ. 1955); *See, United States v. Morrow*, 537 F.2d 120, 136 (5th Circ. 1976).

The prejudice against the Petitioner SEGRERA, began at the very outset of the trial. The Defendants, Futch and Gallops, asserted the defense of entrapment. In their opening statements, they outlined to the Jury that they would admit the acts as alleged by the Government. (T. 23, 24-25, 26, 27-33).

This presentation by the other Defendants directly, clearly and unduly prejudiced SEGRERA. The Appellant demonstrated a specific and compelling prejudice arising out of inconsistent defenses. The Appellant moved the Court for severance in the face of co-Defendants' in-court statements that clearly and directly, as well as indirectly, implicated him. The District court abused its discretion in denying the Petitioner, SEGRERA's motions for severance, *Schaffer v. United States, supra; Barton v. United States, supra; United States v. Morrow; supra.* Thus the Petitioner's Fifth Amendment right to due process was violated.

4. *Motion for Mistrial Should Have Been Granted When the Government's Attorney Presented Improper Prejudicial Questions and Comments to the Jury.*

The Prosecution put improper and highly prejudicial comments, questions and arguments before the jury. The trial Court's denial of Petitioner's motions for mistrial based on these instances of Prosecutorial misconduct were error. The Prosecution's improprieties represented a repeated, deliberate threat to the integrity of Petitioner's

trial. They were so inordinately prejudicial that they undermined the jury's impartiality, and no instructions by the trial Court could cure the damage done the Defendant.

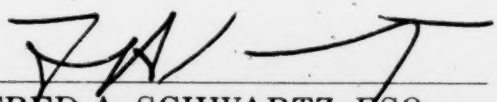
The prejudicial statements not only undermined the jury's impartiality, but they also undermined the Prosecutor's responsibility as a public officer. *Miller v. State of North Carolina*, 583 F.2d 701 at 706 (4th Circ. 1978), *citing Berger v. United States*, 295 U.S. 78, 85, 88, 55 S.Ct. 629, 79 L.Ed 1314 (1935).

In light of the paucity of evidence against the Petitioner SEGRERA, and the serious impropriety of the confusing statements regarding the evidence made during closing argument, as well as the improper and prejudicial Prosecutorial statements during presentation of the case, justice requires that the judgments against Mr. Segrera be reversed. *United States v. Warren*, 550 F.2d 219 (5th Circ. 1977). Since it is hard to imagine the Prosecutor's improper statements as having anything but a substantial effect in the minds of the jurors, it is impossible to hold this error harmless. The Petitioner did not receive a just and fair trial under the Sixth Amendment of the Constitution of the United States of America. Therefore, a reversal and/or new trial is warranted in this case.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted. In light of the insufficiency of evidence against the Petitioner, and the due process violations it is clear that the jury could not have reached its verdict against him free of numerous prejudicial errors of constitutional proportion that occurred during trial. The nature of these errors demand that Petitioner, SEGRERA's conviction on all three counts be reversed and a new trial granted in the interest of fairness and justice.

Respectfully submitted,



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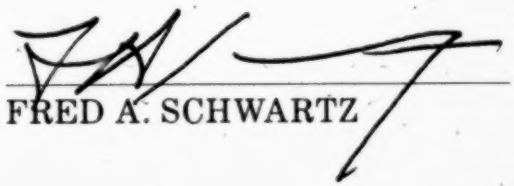
CERTIFICATE OF SERVICE

I hereby certify that a true copy of this petition was mailed to the United States attorney for the Middle District of Florida, P.O. Box 2778 Tampa, Florida, 33601, this 14th day of March, 1985.



FRED A. SCHWARTZ

Appendix

APPENDIX A

Rule 29. Motion for Judgment of Acquittal

(a) Motion before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a Defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the Defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) Motion after Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of

acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

APPENDIX B

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant

A "declarant" is a person who makes a statement.

(c) Hearsay

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay

A statement is not hearsay if—

(1) Prior statement by witness

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject

to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent

The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

APPENDIX C

Rule 14. Relief from Prejudicial Joinder

If it appears that a Defendant or the government is prejudiced by a joinder of offenses or of Defendants in an indictment or information or by such joinder for trial together, the Court may order an election or separate trials of counts, grant a severance of Defendants or provide whatever other relief justice requires. In ruling on a motion by a Defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the Defendants which the government intends to introduce in evidence a the trial.

APPENDIX D

Rule 33. New Trial

The court on motion of a Defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a Defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. a motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.